

[HIGH COURT OF AUSTRALIA.]

RYAN PLAINTIFF ;

AND

THE COMMONWEALTH DEFENDANT.

SHEPHARD PLAINTIFF ;

AND

THE COMMONWEALTH DEFENDANT.

H. C. OF A. *Public Service (Cth.)—Transferred department—Rights preserved to officer—Unlawful retirement from Public Service—Measure of damages—The Constitution (63 & 64 Vict. c. 12), sec. 84.*

1936.

ADELAIDE,

Sept. 28, 29.
Oct. 7.

Evatt J.

R. and S. were officers of the Postal Department of South Australia, when that department was transferred to the Commonwealth pursuant to sec. 69 of the Constitution. Each remained in the Public Service of the Commonwealth until 1932, when they were unlawfully retired from the Service. Both were then a little over sixty-three years of age. It was found that R. would have been capable of performing his duties as telegraphist up to the age of seventy years, that he would retain the capacity to render other services to the Commonwealth (probably at a lower salary) up to seventy-five years, and that he would probably live to eighty-one years. Had he not been unlawfully retired, he would have been entitled to a larger pension than that which he actually received on retirement, though he would have had to make a higher contribution in order to receive this pension. On his retirement he received payment of a lump sum in lieu of furlough, and since his retirement he had secured other employment in which he was still engaged. Damages were assessed on the following basis :—By totalling the following items : (a) The amount which R. would actually have received by way of salary as a telegraphist up to the date of trial ; (b) the present value of his future salary in that capacity (including

probable receipts for Sunday and holiday work and overtime) up to the age of seventy; (c) an estimated amount which R. would have received between the ages of seventy and seventy-five (the period of his capacity for other work); and (d) an allowance for the loss of the additional pension to which R. would have been entitled had his services not been dispensed with when they were; and by deducting from this total the total of the following items: (1) The lump sum in lieu of furlough paid to R. on his retirement; (2) the pension payments actually received by him up to the date of trial; (3) the wages earned by him outside the Service up to that date; (4) the present value of the pension which would in fact be paid to him until he reached the age of seventy; (5) the amount which he would have been required to pay in order to establish his right to the higher pension allowed for in clause *d* above; and (6) an estimate of his future earnings outside the Service. In S.'s case it was found that he would have been able to perform his duties as telegraphist up to the age of about sixty-nine, that he would not then have been capable of any work in the Service, and that the attainment of seventy-nine years was his expectation of life. Since his retirement he had obtained no other employment. He had received no periodical pension, but had elected to take, and had been paid, a lump sum in lieu of pension. Damages were ascertained on a similar basis, that is, by totalling the following items: (a) Salary actually lost up to date of trial; (b) the present value of future salary as telegraphist (including payments for Sunday and holiday work and for overtime) during the remainder of his capacity; (c) the present value of a pension between the ages of seventy and seventy-nine (the probable date of death); and by deducting from the total (1) the lump sum in lieu of furlough paid to S. on his retirement, and (2) the lump sum in lieu of pension actually received by him.

Observations as to matters affecting computation of damages.

Lucy v. The Commonwealth, (1923) 33 C.L.R. 229, applied.

Edwards v. The Commonwealth, (1935) 54 C.L.R. 313, referred to.

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TRIAL of actions.

Actions were brought in the High Court by James Edward Ryan and George William Shephard against the Commonwealth. Each plaintiff had been appointed to an office in the Civil Service of South Australia under the provisions of the *Civil Service Act* 1874 (S.A.). On 1st March 1901 each plaintiff was employed as a telegraph operator at Adelaide in the Post and Telegraph Department of the Civil Service. On that date the department became transferred to the Commonwealth under sec. 69 of the Constitution. The plaintiffs were then transferred to the Public Service of the Commonwealth and were continuously employed therein as telegraphists until 1932. The plaintiffs alleged that they were then unlawfully and wrongfully

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dismissed from the Public Service of the Commonwealth, and they claimed damages. The plaintiff Ryan's dismissal was on 31st October 1932 and the plaintiff Shephard's on 28th May 1932.

Following the decision in *Edwards v. The Commonwealth* (1), it was admitted that the retirements were unlawful. In each case moneys were paid into court, and the actions came before the court for assessment of damages. The two actions were heard together.

For the purpose of the actions the following facts were admitted :—

In Ryan's Case.

1. The plaintiff was born on 17th September 1869.
2. The plaintiff was dismissed on 31st October 1932.
3. The plaintiff's age at dismissal was 63 years 6 weeks.
4. The plaintiff's classified salary at dismissal was £342 per annum.
5. The plaintiff's salary had been reduced under the provisions of the *Financial Emergency Act* and at dismissal he was receiving £275 per annum salary and a sum of £52 per annum for child endowment.

6. At dismissal the defendant paid the plaintiff £327 in lieu of twelve months' leave of absence, being £275 in respect of salary and £52 in respect of child endowment.

7. The plaintiff had contributed £1 7s. 11d. per fortnight to the superannuation fund at a rate which would have entitled him to six units of pension—£156 per annum—at the age of sixty-five years. In order to receive the said six units of pension he would have had to pay £1 7s. 11d. per fortnight from 1st November 1932 to 22nd December 1933, that is to say, a sum of £41 12s. 10d.

8. From the date of dismissal until the 2nd November 1933 the plaintiff received £103 13s. 9d. pension, being at the rate of £103 per annum, the pension being subject to the *Financial Emergency Act* during this period. From 3rd November 1933 up to the present time the plaintiff has received pension at the rate of £122 1s. 2d. per annum.

9. The plaintiff at dismissal was entitled to and was receiving child endowment for four children under the age of fourteen years at the rate of £13 per annum for each child. Two of such children attained the age of fourteen years on 19th December 1933

and 15th March 1935 respectively. The other two children will attain that age if they live so long on 25th February 1939 and 1st November 1940.

10. During the three years prior to his dismissal the plaintiff had sick leave from 23rd September 1929 to 5th October 1929 and on 12th December 1931.

11. Since dismissal the plaintiff has been employed as a clerk in the Postal Institute. He received £1 10s. per week, which was increased to £2 13s. 4d. per week, and in July 1935 this amount was again increased to £3 per week. The plaintiff is now receiving £3 per week and has received in all up to 21st September 1936 the sum of £399 and no more.

12. Since the plaintiff's dismissal the salaries of telegraphists have varied in the manner following and such variations would have applied to the plaintiff had he remained in the service. The said salary was increased on 12th October 1933 to £292 per annum, on 19th July 1934 to £306 per annum and on 1st July 1935 to £312 per annum.

13. Telegraphists were and are required by the rules of the Service to work on some Sundays and holidays during each year and are paid an additional sum for this work amounting to between £6 and £8 per annum. Overtime was at the time of dismissal and still is required to be worked on occasions and the payment for such overtime was between £3 and £4 per annum.

14. The plaintiff was at the date of dismissal a telegraphist stationed at the Adelaide General Post Office.

In Shephard's Case.

1. The plaintiff was born on 17th January 1869.
2. The plaintiff was dismissed on 28th May 1932.
3. The plaintiff's age at dismissal was sixty-three years and four months.
4. The plaintiff's classified salary at dismissal was £336 per annum.
5. The plaintiff's salary had been reduced under the provisions of the *Financial Emergency Act* and at the date of dismissal he was receiving £283 per annum.

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6. At the date of dismissal the defendant paid to the plaintiff the sum of £283 in lieu of twelve months' leave of absence.

7. The plaintiff had contributed to the superannuation fund at a rate which entitled him to 4 units of pension—£104 per annum—upon retirement at the maximum age for retirement, namely, at the age of sixty-five years.

8. Purporting to act under the provisions of secs. 29 and 39 of the *Superannuation Act* 1922-1931 the defendant offered the plaintiff either a pension of £83 19s. 2d. per annum (being the actuarial equivalent of the plaintiff's and the defendant's contributions to the fund; the plaintiff having exceeded the age of sixty but not having attained the maximum age for retirement) or a lump sum of £1,188 17s. 11d. (being in effect the then present value of the said pension of £83 19s. 2d. per annum).

9. The plaintiff accepted the said lump sum.

10. During the three years prior to the plaintiff's dismissal he had sick leave on 6th May 1930 and (suffering from pleurisy) from 21st May 1930 to 12th July 1930.

11. On 10th March 1932 the plaintiff's office as a telegraphist was abolished. He was then a telegraphist employed at the Adelaide General Post Office. The defendant then transferred the plaintiff to the taxation office, where he was employed at the date of his dismissal. The plaintiff continued to be employed at the said taxation office for a short period after his said dismissal. Except as aforesaid the plaintiff has had no employment since his said dismissal on 28th May 1932.

12. Since the plaintiff's dismissal the salaries of telegraphists have varied in the manner following and such variations would have applied to the plaintiff had he remained in the service. The said salary was reduced on 29th September 1932 to £275 per annum. The said salary was increased on 12th October 1933 to £292 per annum, on 19th July 1934 to £306 per annum, and on 1st July 1935 to £312 per annum.

13. Telegraphists were and are required by the rules of the Service to work on some Sundays and holidays during each year and are paid an additional sum for this work amounting to between £6 and £8 per annum. Overtime was and still is required to be worked on

occasions and the payment for such overtime was between £3 and £4 per annum.

Further facts appear from the judgment hereunder.

Cleland and *F. E. Piper*, for the plaintiffs.

Ligertwood K.C. and *Brebner*, for the defendant.

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Cur. adv. vult.

The following written judgment was delivered :—

Oct. 7.

EVATT J. These cases are consequential upon the decision of the Full Court in *Edwards v. The Commonwealth* (1) declaring the illegality of the dismissal of an officer in circumstances similar to those in which each of the two present plaintiffs was dismissed. Wrongful dismissal is admitted, and damages have to be estimated.

It is agreed that up to September 30th of the present year, Ryan would have received £1,351 by way of salary. In fact he received £327 in a lump sum in lieu of furlough due at the date of retirement. He has also received since the date of his dismissal £458 by way of pension payments. Being a man of comparatively youthful appearance, and having a young family, he bestirred himself to obtain employment, and has earned £402 as a clerk in the Postal Institute—a fact which enures to the benefit of the defendant.

These three sums in fact received amounted to £1,187 so that, assuming that Ryan would still have been capable of working up to the present as a telegraphist, he has already lost (up to September 30th, 1936) the sum of £164.

The next question to determine is an estimate of the time up to which Ryan would have been capable of performing his duties as telegraphist. I think the answer to this question is up to the age of seventy years certainly, and quite possibly longer. Further, the probable date of his death may be taken as at eighty-one.

Making the calculation by reference to present values of future salary (the plaintiff being assumed able to work until seventy as telegraphist), and including the probable amount he would have

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received by way of pay for Sunday and holiday work and for over-time, also the allowances of payment for children, the plaintiff should be credited with £970 and debited with £344, being the present value of the pension which will in fact be paid to him until he reaches the age of seventy. This will mean the addition of £626 to the £164 already mentioned, giving a total of £790.

I also find that Ryan's capacity to perform efficient services for the Commonwealth in a capacity other than that of telegraphist would certainly have lasted for some years after he reached the age of seventy. But it has to be remembered that if Ryan had been retained in the service after seventy, he would probably have received a salary substantially less than that assigned to the job of telegraphist. Further, he has to be debited with the pension moneys which he would have received between his reaching seventy years and the time of his ultimate retirement. I think that in respect of his capacity after the age of seventy Ryan should be credited with at least £400, having regard to the fact that he would certainly have been competent to do responsible work for some years past seventy. This increases the provisional total to £1,190. Then, having regard to the period between incapacity and death at eighty-one, a period of (say) about six years, something should be added as compensation for loss of the additional pension of £34 per annum which Ryan would have been entitled to receive if his services had not been dispensed with when they were. The figure for this accumulated pension may fairly be put down as being £130. This brings the total of Ryan's estimated loss to £1,320. From this figure has to be deducted a sum of £42, i.e., the amount required to be paid by Ryan in order to establish his right to a higher pension. This reduces the total to £1,278.

From the figure of £1,278 thus reached has to be taken into account a deduction based upon the probability of Ryan's future earnings outside the service. At present, Ryan has a clerical position with the Postal Institute. But he has no security of tenure in the position. He may lose it in a month, and it is quite unlikely that he will continue to hold the position for any very long period. I think the chances are that, at no far distant date, Ryan will have to give place to some younger person, or his duties may be absorbed

by another officer. In my view, if Ryan's probable earnings in his present or other similar capacity are set down at £200, the defendant will be adequately protected.

I assess Ryan's damages as at £1,078. I have worked out the figure upon the above method of calculation and, independently of the method of calculation adopted, I think that having regard to past facts and future probabilities such figure fairly represents the net loss Ryan will have sustained by the wrongful act of the defendant.

In Shephard's case there is a conflict of medical evidence. It is established that, up to the date of assessment (September 30th, 1936), the plaintiff would have lost salary amounting to £1,327, assuming that he would have been capable of performing his duties as telegraphist up to that date.

I have reached the opinion that he would have been so capable.

This view is supported by some of the medical witnesses. I was impressed by both plaintiffs, especially Ryan. Both are lively and keen men, in thorough enjoyment of life. I do not agree with the medical opinion that Shephard was mentally slow; on the contrary, I think that his apparent slowness in answering the doctor's questions was due to caution and that, upon medical examination, he was nervous. Shephard looks his age more than Ryan, but this is largely due to the consequences of an attack of malaria which he suffered in 1898 while he was performing his duties in the Northern Territory. This attack has had no injurious consequences. On the whole, I consider that Shephard would have been able to perform his duties as telegraphist up to the age of about sixty-nine, and that the attainment of seventy-nine years may fairly be put down as his expectation of life. Assuming for the purpose of a calculation that Shephard would have been able to work as telegraphist until seventy, this means that he would have lost wages (including overtime) during the remainder of his period of capacity, and the figure in respect of this may be put down at £690. He would also have lost the present value of a pension between the age of seventy and the probable date of his death, and that present value may be set down at £722. As in Ryan's case, I reject the claim of the plaintiff to the present value of one year's pay in lieu of furlough at the end of the period

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of capacity. By adding together £1,327, £690 and £722 I reach the figure of £2,739 in respect of the items already enumerated. From this figure has to be deducted the sum of £1,472, being the amount of money actually received by Shephard (no further payment coming to him by way of pension or otherwise). This gives a difference of £1,267. In this calculation I allow nothing for Shephard in respect of his probability of earning money in the service after the age of seventy, and I also deduct nothing in respect of the probability of future earnings which, in the circumstances, is very remote. On the assumption of a capacity life to seventy years, this should leave him £1,267 by way of damages. But I do not consider that Shephard would have been able to work as telegraphist quite up to the age of seventy, and taking into account his consequential increased pension payment, I deduct £200 and reach a figure of £1,067.

I will now refer to several matters mentioned in argument. In assessing damages in Ryan's case, for instance, I have deducted the sum of £327 paid to the plaintiff upon his dismissal in lieu of twelve months' furlough. The plaintiff contends that this figure should, after deduction, be again credited to him in assessing damages or (which is the same thing) not deducted at all. The argument is, that, if the plaintiff had remained in the service, he would have received an equal sum of money for furlough leave when sixty-four years of age. The possibility of his receiving it at the date of his ultimate retirement is too remote.

In cases like the present, a comparison has to be made between the plaintiff's financial position if not dismissed, and his financial position after dismissal. If not dismissed, the payment of £327 to Ryan would not have been made except at the age of sixty-four, and the plaintiff would have been compelled to take his leave of absence. As it was, he was paid the same sum (or approximately so) and rendered no services to the Commonwealth. The effect of the actual payment—when a comparison is made—makes no difference, because the inquiry is as to the loss of working life—in the Commonwealth Service—caused by the dismissal. If (say) Ryan's capacity would have ended at sixty-seven—four years after his dismissal at sixty-three—the comparison would be between what he would have got if retained in the Service, i.e., four years' pay (though in respect of

one year from sixty-four to sixty-five he would have been on leave), and what he received in fact, i.e., one year's pay (though in respect of that year also he was not required to work). The financial difference to the plaintiff in such case would be three years' pay. The example clearly shows that, in estimating the damages due to the defendant's wrongful act, where the period of the plaintiff's working capacity in the defendant's service has to be estimated, the proper procedure is to fix the age of probable retirement (e.g., sixty-seven in the above example) as at so many years from the date of his dismissal (e.g., four in the above example), to credit him with the salary for such four years, and debit him with the salary or amount paid by way of furlough allowance. As I pointed out in argument, exactly the same result would be reached by regarding the payment of £327 to the plaintiff as postponing the date of his effective dismissal for the period of one year. Then, upon the hypothesis that at sixty-seven years he would have been incapable of performing his duties, the loss in such case would still be three years' salary.

In *Lucy v. The Commonwealth* (1) the matter was not analyzed in the above way, but the decision of the court supports the view that the lump sum payment should be deducted (per *Knox* C.J. (2)).

Another question discussed was whether the overtime payments should be taken into account. The evidence is to the effect that officers such as both plaintiffs were required to work overtime, and the result thereof was to augment their earning by a regular sum of money. There is nothing in *Lucy's Case* to prevent the court taking into consideration this closely associated source of increased remuneration. All that *Knox* C.J. said in *Lucy's Case* (2) dealing with the "right" to use of residence, profit on sales of stamps, &c., was that the particular plaintiff had no "right" to such emoluments enforceable against the Government of South Australia and so preserved by sec. 84 of the Constitution (See p. 239, and par. 5, p. 231). It was never suggested that, if additional emoluments had been attached to *Lucy's* employment with the Commonwealth, instead of his having only a regular salary, such emoluments should not have been taken into consideration, provided there was a probability of their continuance if he had not been dismissed. Generally speaking, in an action for wrongful dismissal, a plaintiff is

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(1) (1923) 33 C.L.R. 229.

(2) (1923) 33 C.L.R., at p. 239.

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entitled to recover not only the salary he is wrongfully prevented from earning, but also any benefits or advantages attached to the contract of service.

Of course, but for *Lucy's Case*, it might have been contended that it is only the "rights" of the transferred officer under State law which should be regarded in estimating damages. This contention, as expressed by *Isaacs J.*, was that sec. 84 of the Constitution should be interpreted as merely protecting a transferred officer's existing and accruing salary rights as under South Australian law. But this interpretation was definitely rejected in *Lucy's Case* (1), for *Higgins J.* emphasized (1) that the contract broken was not a mere promise to pay money but to pay wages for service; and the breach of contract consisted in not allowing the employee to continue in the service so as to get the wages (at p. 248), and (2) that sec. 84 of the Constitution merely added a certain term to the contract, viz., that the right to a conditional life tenure was expressly preserved (at p. 249).

Another question is whether the court is necessarily bound to assume that at the age of seventy (after which he would probably not have been able to continue as telegraphist) Ryan would have been immediately dismissed by the Commonwealth. My view is that, at the time when Ryan was finding himself unable to perform efficiently his duties as telegraphist, he would probably have been able to perform other important duties in the department or the Service. Must I assume as a fact that, acting under the power defined in sec. 28 of the South Australian *Civil Service Act*, the Commonwealth would certainly have dismissed Ryan at seventy because of his then incapacity as a telegraphist? I do not think so. On the contrary, I think that Ryan would probably have anticipated his growing inefficiency as a telegraphist by seeking other suitable Commonwealth employment, and the policy of the department seems to be, as stated by Mr. Simmons, not to object to a transferred officer who has a life tenure being placed in another suitable departmental position though less strenuous and not so well remunerated. Moreover, even if incapacity began to reveal itself at the age of seventy and it was then proposed by superior officers to initiate a move to

secure Ryan's dismissal, a good deal of time would necessarily elapse before the process could be completed.

In Shephard's case I think that the probability of his seeking and obtaining further service under the Commonwealth (after incapacity as a telegraphist) is so remote that I should ignore it.

There will be judgment for Ryan for £1,078 and costs.

There will be judgment for Shephard for £1,067 and costs.

The moneys paid into court will be paid out to the plaintiffs and deducted from the amount of damages awarded.

Solicitors for the plaintiffs, *Cleland & Teesdale Smith*.

Solicitor for the defendant, *W. H. Sharwood*, Crown Solicitor for the Commonwealth, by *Fisher, Powers, Jeffries & Brebner*.

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ROBERTSON APPELLANT ;

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Income tax (Cth.)—Assessment—Exempt income—Whether “income derived from sources outside Australia” and “chargeable with income tax in any country outside Australia”—Taxability of income in Great Britain—Questions affecting—Interference with decision of commissioner or board of review—Income Tax Assessment Act 1922-1931 (No. 37 of 1922—No. 23 of 1931), sec. 14 (1) (g) (i.) (1).

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The court can only interfere with the determination or decision of the Commissioner of Taxation or the board of review upon a question whether income included in an assessment to income tax is “income derived from sources outside Australia” and “chargeable with income tax in any country outside Australia” within the meaning of sec. 14 (1) (g) (i.) (1) of the *Income Tax Assessment Act 1922-1931*, and is accordingly exempt income under that section, when it is affirmatively established that the exercise of the judgment or discretion reposed in the commissioner or the board of review has miscarried.